Office-Supreme Court, U.S.
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JUL 11 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 1178 [redacted] 146

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,

Petitioner

v.

ARTHUR O. HECKER,

Respondent

MORTIMER W. H. COX, Administrator of the Estate of LEONA A. JACKSON, Deceased,

Petitioner

v.

ELEANORE R. WRIGHT, also known as ELEANORE R. HECKER,

Respondent

REPLY BRIEF OF PETITIONER

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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CORRECTIVE STATEMENT

Respondents' statement requires some correction.

1. Saying that Mrs. Jackson "had a history of mental and physical ills dating back to the 1940's" is like compressing into one sentence isolated instances of infelicity over a

long marriage to give the appearance of a continuous course of conduct required to make out a cause of divorce on indignities. On some occasions *years* before the delusions, Mrs. Jackson, for a matter of a minute or two, was apparently unable to move or speak on awakening in bed. I do not know whether it was catalepsy or not; it appeared to me what I supposed catalepsy looked like. Catalepsy is not a mental ill; and there was no evidence whatever of any mental ill until 1952; there was no evidence of any other physical ill until 1954 when diabetes appeared, of a very minimal nature, which was controlled by diet until 1957, never required more than 18 to 22 units of NPH 40 insulin a day until her death in December, 1961, and was under good control until then.

2. The record does not show that Mrs. Jackson was treated at Pennsylvania Hospital with chlorpromazine. A doctor, Draper, who happened to have an office in the Pennsylvania Hospital, *prescribed* for her. He gave her no drugs. I do not know that he prescribed chlorpromazine. The record shows this (R 3b). Line 21

3. The doctors who threw us on trial did say she had arteriosclerosis but this is to be doubted in view of what they did to us on the stand contrariwise to what they said in preparation. The swift, radical change in personality from which she never recovered belies arteriosclerosis. And we should not be bound by what they said *against* us because of the doctor v. doctor complex. Even if arteriosclerosis were present, the Court can take judicial notice that that does not render one "a senile dement or mentally incompetent": Olson v. Olson, 46 N. W. 2d 1, 11 (Iowa).

4. The same applies to: "she could not care for herself," "was irrational" and "communicated on a superficial basis," before Embreeville. I lived with her and my testimony shows she did most of the things a normal person would, except her judgment was affected and she at times thought people were "about" (R 75a-78a).

5. There is no "routine dose" of chlorpromazine. It is a drug which affects different persons in widely varying and highly individualized ways—so much so that one may be killed by 5 milligrams and another can take 4800 milligrams without adverse effect. That is why this particular drug is more highly dangerous than almost every other of the so-called tranquilizers.

6. Respondents persist in speaking of "treating physicians." Two prescribers were totally unlicensed; one was licensed in North Carolina; all were mere trainees. None was permitted to prescribe CPZ in Pennsylvania. Even the training permission for Mainero had expired when she prescribed three times in July! (Ex. P-1-C, R 7a; P-3, R 19a).

7. Stahlnecker testified that in his opinion there *was* an overdosage, not merely that there *might* have been (R 135a). Lines 7

8. Stahlnecker's testimony: My undenied affidavit in support of motion for new trials (R 61-66a) is a complete answer to Stahlnecker's statement that I "tried to make him say" chlorpromazine caused Mrs. Jackson's condition. Yes, I had numbers of conferences with him, but, at every one of them I repeatedly told him that I sought from him nothing but his own true opinion.

ARGUMENT

I. THE APPLICATION OF THE DECISIONAL RULE THAT EXPERT TESTIMONY IS NECESSARY TO SHOW NEGLIGENCE IN A DOCTOR'S PROFESSIONAL ACTS CONSTITUTED A DEPRIVATION OF DUE PROCESS, EQUAL PROTECTION OF THE LAWS AND A JURY TRIAL.

Although respondents acknowledge that these are the questions presented, they do not discuss the issues but proceed at once to try to submerge them by semantics involving "use," "toxic," "poison." They have avoided this question as if it were the poison which chlorpromazine is.

This question cannot be so submerged.

There are 296,000 lawyers in this country. Ask any of them who are in either general or negligence practice (and a fair guess would be one-fourth, 74,000) what they tell their clients who come to them with medical malpractice cases. If it is anything less than sawing off the wrong leg or leaving an assortment of implements inside the belly, the answer is "You have to have expert testimony, and you can't get a doctor to testify against another doctor." After I had put this squarely before the Court of Appeals, Judge McLaughlin asked Mr. Beasley, "What about the constitutional question?" Mr. Beasley (a negligence specialist) answered, "I handle a good many malpractice cases and *what Mr. Jackson says is true.*" "But," he says, "this is a common law action and the Supreme Court of Pennsylvania can wipe it out." This might be, generally, *but no supreme court and no legislature has the constitutional power to wipe out a cause of action, recognized by the law* (as Pennsylvania recognizes a malpractice cause of action), AFTER *the cause of action has* ACCRUED, by the requirement of evidence which is unattainable. An existing cause of action is a well recognized species of property protected by the Constitution. Nor can the state, through its arm, the judiciary, constitutionally impose on the remedy (the right of action) any unreasonable burden. Since the type of evi-

dence—expert testimony—(and this means, in practical experience, by a doctor) is known by everyone, as even the defense admits, to be unavailable, the application of the decisional rule, putting the burden on petitioner to supply that kind of testimony, in effect destroys his cause which the Fourteenth Amendment protects and which the state may not take away without the provision of another adequate remedy. Pennsylvania has not provided any other remedy.

Judge Carroll has accurately appraised the situation in Demchuk v. Bralow, 404 Pa. 100, 117, 170 A. 2d 868 (spurned by respondents), where he says:

> "I want to say this by way of conclusion, because this record may go to the Supreme Court, my feeling about the Robinson-Wirts case is this: I think it constitutes an unwarranted extension of protection to the physician, absolutely unwarranted, and this case establishes that fact. Certainly, it seems to me if the effect of a doctor's diagnosis or his treatment is in issue, a lay jury is not competent without expert testimony to pass on medical propriety, and you can't get medical testimony in any part of this great big wide world, and the time has come, and what I have said here may help accelerate that time, that the law will be so formed as to permit the testimony of persons not particularly skilled in medical practice, but people with common sense, and conclusions will be permitted to be drawn from the presumptions that arise in cases of this kind. As of this moment, a lay jury is not competent to pass upon medical propriety, and that is the Robinson case in a nutshell.
>
> "However, let me say that where care is exercised by a doctor in effecting an otherwise proper treatment, when that is at issue, the use of care by the doctor, it should present a jury question. However, the Robinson-Wirts case says it does not, and again I say it isn't for this court to arrogate to itself the

authority to disrupt the existing law of Pennsylvania, with which I am, however, definitely out of accord.

"Therefore, I am going to grant a nonsuit. If the Supreme Court reverses me, as I hope it will in this case, I would be very much happier than if they affirmed what I have done here this morning."

Two states have seen the light and, by statute, have by-passed the impossible decisional rule by permitting the use of text books to show the matters which the application of the rule here operated to prevent: Mass. Gen. Laws C. 233, §79c (1949). Nev. Rev. St. 1957, §51.040.

All along the line any discussion of these constitutional questions has been avoided. Judge Luongo says (R.73a), ". . . plaintiff now asks this Court to disregard that requirement of Pennsylvania law [requirement of expert testimony to establish injury to decedent]. *Of course I may not.*" If petitioner's position, that the decisional rule requiring expert testimony is unconstitutional, is correct (and this applies equally whether the supposedly required expert testimony is on injury, causation or negligence, because it involves in each instance doctor v. doctor), *then of course* Judge Luongo not only "may" disregard that "requirement" but his oath of office requires him to disregard it.

The Court of Appeals does not even *hint* at the constitutional questions in a 7-line opinion.

My last hope is that this Court will deal with these questions and I am most hopeful of the result if it will do so.

Respondents dismiss the affidavits (R 61-6a) as "covering mainly conversations between Mr. Jackson and other people." These affidavits, permissible under the Rules of Civil Procedure (59c) and undenied, set forth what Staples and Stahlnecker told me on causation, in preparation for trial, and were proper as going to establish the constitutional propositions here asserted. In vein similar to that of the suggestion in the TV commercial, "Tell the lawyer the truth in preparation, but give him *nothing* on the stand."

The averments in the affidavits about Gottlieb and Winkelman further reinforce the ancient refrain, "You can't get a doctor."

The affidavits were necessary because the cases now have *built-in proof* of what is happening throughout this country as a result of application of this unconstitutional and unconscionable rule. With a population of 193.000,000 people there must be 50,000 prospective malpractice actions a year which are stifled by this rule. That is an average of about one case in 16 months for each general practitioner or negligence specialist in which he has to tell his client, "You can't prove your case."

See, on the Conspiracy of Silence, Trial of Medical Malpractice Cases (Louisell and Williams, §14.01 et seq., p. 418 et seq.).

The whole case is explicable by what Dr. Winkelman said in refusing to be an expert witness: "I wouldn't want to do anything which would make me a social outcast." A doctor won't testify against another doctor defendant where injury, cause or negligence of the other doctor is in question.

This case is broader than the tragic wrong which was done Mrs. Jackson. The principle which this Court is asked to enunciate is of grave importance to every person in this country. Remove the blindfold from the Lady's eyes so that she may see the shackles which bind a plaintiff in a malpractice action to the point at which the remedy becomes a will of the wisp.

II. Refusal of Adequate Time for Preparation and Exclusion From Participation in Trial Constituted a Denial of Due Process and a Trial by Jury.

Respondents now suggest that realities be ignored.

I was the surviving husband of Mrs. Jackson, who died intestate. There was and is no other person as to whom all of the following could truly be said: He knew Mrs. Jackson best, he observed at first hand what the drug did to her, he knew something about the drug and its capabilities, he was

a lawyer of almost 40 years who had some reasonable concept of how a case should not be tried, he had talks with defendants about Mrs. Jackson's condition, he talked with plaintiff's doctor witnesses and knew what they had said in preparation.

It is true, as respondents say, I was not formally plaintiff of record, I was not formally counsel of record. But it is also true that I was treated throughout the case, by Judge and respondents, as the real party in interest and as counsel in the case. The record shows this in ten different places. Three examples will suffice:

A. Mr. Beasley, at the hearing before Doty, J., on January 7, 1963: "This case was on trial for two days when the *plaintiff, the real party in interest, a Mr. Jackson,* discharged his attorney. . . . Judge Luongo instructed *Mr. Jackson, who was the real plaintiff in the case. . . . Mr. Jackson is the real party in interest*" (p. 2, line 12; p. 3, lines 14, 19).

B. Judge Luongo's opinion: "Decedent's husband apparently did all of the trial preparation" (R 70a).

C. Hearing on September 25, 1963, to correct record: "Jackson: *The Court considered me as a real party in interest* and I think properly so." The Court: (Judge Luongo) *"No question about that"* (p. 19, line 11).

It seems somewhat late in the case and inconsistent with respondents' prior position to try to avoid what appears as a basic error of the Trial Judge, and in itself lack of due process, in excluding from participation in the case one considered as a party in interest and counsel.

I made the motion for the withdrawal of a juror only after counsel at the first trial, although he had earlier agreed, refused to do so.

The motion was made because prior counsel had called *as our* witnesses, de Schut, (Mainero) de Schut, the very two unlicensed *students* who, although forbidden by law, prescribed for Mrs. Jackson this deadly drug (which was

administered to her under those prescriptions) and Dr. Harris, their immediate superior. They were *all actually hostile* because their leanings were naturally toward defendant doctors, their former superiors.

By the examination of de Schut and de Schut, *on technical medical matters*, diabetes, etc., counsel automatically qualified them (mere trainees in psychiatry), as plaintiff's *expert witnesses* so that when they were turned over to defense for cross-examination they gleefully absolved the drug as a cause of the injury.

At this point, before I had even taken the stand to testify to the facts, the case was lost beyond recall and I knew that if a juror were not withdrawn and the cause continued there would be no possible chance. Counsel was sick. He had diabetes, cardiac insufficiency, high blood pressure and stomach ulcers, the result of which showed clearly, unfortunately, in the trial, and his handling of the case conclusively demonstrated it. (This appears of record in the first trial.) The Judge and every lawyer in the Courtroom knew what was happening.

The fact is that a juror was withdrawn and the cause was continued and once that was done, the refusal to allow sufficient time for succeeding counsel to prepare was itself a denial of due process. There were papers, documents, memoranda, 1004 pages of pretrial discovery and notes of the first trial, statements of witnesses, witnesses to interview, study of the drug, etc., etc., etc., a pile 3 feet high to go over. Mr. Turner had six weeks after he was able to get to the case. And although he devoted much time to the preparation, he could not do so to the exclusion of his other practice; the time was too short; it could not be done. Mr. Turner did as well as anyone (better than many would have done) with the case within the limited time, but it was impossible. It is no reflection on Mr. Turner to say that if we are so fortunate as to have this Court see that due process requires a new trial, the record will be without the mutilation which inevitably resulted from lack of time.

Respondents should not be heard to criticize this as a ground for application here because it was they who forced us on to the second trial before succeeding counsel could adequately prepare.

Judge Luongo could not have known whether the case was "excellently tried" for he could not know what was not produced before him.

"*Constant* consultation" is a broad generality, and, like most generalities, an exaggeration, or we would not be here. It is true that I was in frequent consultation with counsel at the first trial because I would have had to be an idiot to sit quietly without seeing what was being done to the case in making hostile witnesses our own experts so that they could demolish our case on cross-examination. I was in frequent consultation with Mr. Turner on the second trial because he had not been able to encompass the mass of material in the case. Through no fault of his, the presentation was superficial and I was trying desperately to compensate for the court's denial of sufficient time. To be charged with obstruction and directed to let Mr. Turner alone, when the fault was with the Trial Judge in failing to allow time for preparation, is too much. It is not reasonable to suppose that any judge can know how well a case is tried if he does not know how much was left out due to lack of preparation. There was no disruption whatever of decorum. Judge Luongo's use of the term "belies" is pretty harsh, completely unjustified under the facts and illustrates how even a judge can operate on superficial appearances and completely ignore what was not introduced and therefore what he could not possibly have known should have been put into plaintiff's case.

If it be thought that two trials, or one trial and an aborted trial, are sufficient, I can say only that, if substantial errors, including a grave constitutional one, were made, both prior attempts are as if they had never taken place.

And it is only a bootstrap lifting device to say that the withdrawal of a juror and the continuance were granted

on condition that the trial be held the following month. If the withdrawal was warranted, and we may be sure that Judge Luongo would not have allowed it if it had not been warranted, then the imposition of an unreasonable condition (too short a time) merely compounded the situation.

One critically damaging effect of the lack of time to prepare was counsel's improvident withdrawal of the Philadelphia Psychiatric Hospital Nurses' Notes (which he had never seen before) which would have shown the unending utter confusion. This would have been strong evidence of causation which respondents contend was missing. The Trial Judge indicated a rejection of them without even seeing them (R 159a; Ex. P-9).

III. The Federal and Pennsylvania Acts Relating to Dangerous Drugs Are Applicable.

Respondents dispute the effect of the Pennsylvania Dangerous Drug Act of 1955 (App. C 20-21). It specifically provides that any drug is "dangerous" which is limited by the federal act to use "under the professional supervision of a practitioner licensed by law to administer such drug," and shall not be dispensed except on the prescription of a *Pennsylvania licensed physician.* The federal act (App. C 19) provides that any drug which is so limited, by an effective application under the act, may be dispensed only upon the prescription of a licensed practitioner. Exhibit P-2 (R 15b) shows that the effective application of the maker of chlorpromazine limited the sale of the drug to a licensed doctor's prescription. If it cannot be lawfully *sold or dispensed* without a licensed doctor's prescription it certainly cannot be *used* without a licensed doctor's prescription; a prescription, by definition, relates to the *use* of a drug. What reason could there be for restriction of the *sale* of chlorpromazine to a licensed doctor's prescription if it did not have "a potentiality for harmful effect"? (The reference to the Act of July 11, 1917, is not pertinent here since chlorpromazine was not produced until 1952).

The record is devoid of any evidence whatever that either de Schut or (Mainero) de Schut was "qualified . . . to practice medicine in their own countries," as respondents state, or had any license anywhere. The testimony as to their training was therefore completely irrelevant and improper; and it would have made no difference if they had been licensed *anywhere* outside of Pennsylvania. The reason is a simple one: Pennsylvania, prescribing and therefore knowing its own educational, interneship and licensing requirements, recognizes its own licensees as competent to prescribe a dangerous drug, but will not assume the burden of overseeing the educational, interneship and licensing requirements of 49 other states and 100 countries to determine whether other licensees are competent to prescribe dangerous drugs. The public policy of Pennsylvania thus statutorily declares the incompetence of anyone, *not a Pennsylvania licensee*, to prescribe such a drug.

The federal act (App. C 20) makes admissible any document certified as a part of the records of the FDA. Exhibit P-2 comprised not only the copy of the letter (R 15b), but also the certification under the seal of the Secretary of Health, Education and Welfare in accordance with the act. This certification and copy of the letter were admitted when the defense withdrew objection (T 87).

To reach a conclusion, as respondents do, that the Pennsylvania act of 1955 is merely a mislabelling, misbranding or adulteration act, one must completely discard the express terms of the act which prohibit the dispensing of a dangerous drug except on the prescription of a Pennsylvania licensed doctor (App. C 20-21). There is no basis for guessing that the acts were for protection of outpatients only.

In any event all of respondents' play on words seems fatuous. There is no mystery about chlorpromazine; it is a drug known throughout the world; it is a many, perhaps a hundred, million dollar business; it is one of the most, if not the most, powerful of the tranquilizers.

Everyone, including respondents, knows that no tranquilizer can lawfully be sold, dispensed or used, except on a doctor's prescription. Let anyone try to obtain for use chlorpromazine (Thorazine), meprobamate (Equanil), or rauwolfia serpentina (Reserpine) without a prescription.

Senator Humphrey estimates that there have been 13,000 medical articles *on this one drug alone*; literally hundreds of them warn of its dangers. They are published in the medical journals in English, Arabic, Abyssinian, Bulgarian, Chinese, Czechoslovakian, Danish, Dutch, French, German, Greek, Hebrew, Hungarian, Italian, Japanese, Norwegian, Persian, Polish, Portuguese, Romanian, Russian, Turkish, Yugoslavian, and no doubt other languages. The drug has caused hundreds of deaths reported in the scientific journals; two hours in a medical library with references from Index Medicus and its predecessor would give any intelligent person some comprehension of its commonly-known dangers. The well-known and most significant effect of the drug is *hypotension*. The drug causes the arteries to dilate, thus *reducing blood pressure* (hypotension). This results in anoxia (deficiency of oxygen), because *less* oxygen-carrying blood reaches the brain. The brain cells are damaged if they are deprived of sufficient oxygen for even a very few minutes, 1 to 3 or 4, or a little longer, depending on certain other contents of the blood.

Damaged brain cells, unlike other body cells, are not repaired, regenerated, or replaced; once damaged, they remain so. One effect of damage to the brain cells by the drug is confusion such as was produced in Mrs. Jackson. Winkelman, one of the original experimenters with chlorpromazine for Smith, Kline and French, makers of the drug, clearly stated that this is what happened to Mrs. Jackson (R 63a-64a). Further, if, in fact, Mrs. Jackson was affected with arteriosclerosis, which may be doubted, a fortiori should this drug *not* have been used for it is much more likely to cause damage to brain cells already receiving less than a full supply of blood.

IV. The Drug Was a Causative Factor.

Respondents urge that there was no evidence that Mrs. Jackson was poisoned by chlorpromazine and that what was said was "taken out of context"; they use the euphemistic term "reaction." Staples was asked, "Q. Doctor, from your knowledge did the condition as you have observed it there relate or appear to you to be a toxic condition? A. Yes, it did. Q. Doctor, did you have any difficulty in forming your opinion at that time? A. No, I did not" (R 142a). Line 13 "Q. Doctor, in your opinion, was the condition in Mrs. Jackson as you observed it on July 31, 1957, what is known as a toxic condition? A. Yes, it was" (R 149a). Line 26

If this does not mean that she had been poisoned by the drug then I guess I need more instruction from the lexicographers and grammarians. Respondents appear to equate "toxic" with "fatal." Although, as noted above, chlorpromazine is a killer, "poisoned" does not necessarily mean "killed by poison."

There is a presumption of continuance of the causation of confusion, *by the drug*, once shown, until the contrary is shown. This is sufficient to get to the jury on causation.

I believe injury, causation and negligence were shown, but, admitting arguendo, that any or all were not shown, then the complete answer and full excuse is the application by the Trial Judge of the unconstitutional rule which, by over-burdening the remedy, prevented such showing and thus effectively destroyed the cause of action itself. In any event, the jury, under erroneous instructions, never had a fair chance to pass on causation.

V. The Tenor of the Charge.

The tenor of the charge can best be obtained by reading it to see that it refers to every scrap of *evidence* favorable to respondents as *facts*, but refers to the only *two* items *which the judge mentions* which are favorable to petitioner.

not as facts but: "You have heard that the drug *may* have caused toxic confusion" and "*possible* side effects the drug *may* have had" (R 42a, lines 29-34).

VI. Conclusion.

It is believed that the application of the Pennsylvania decisional rule that expert testimony is required to show negligence in a doctor as related to his acts in a professional way operated to deprive petitioner of due process, the equal protection of the laws and a jury trial, that refusal of sufficient time to succeeding counsel for preparation for retrial was a denial of due process, that the Federal and Pennsylvania acts relating to dangerous drugs govern, that if causation, injury and negligence were not shown, the application of the decisional rule prevented showing them, that the principles here presented are of wide application and that a certiorari should issue.

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